

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Midwest Generation Energy	:	
Services, LLC	:	
	:	02-0740
Application for Certificate of	:	
Service Authority under Section	:	
16-115 of the Public Utilities Act.	:	

ADMINISTRATIVE LAW JUDGE’S PROPOSED ORDER

By the Commission:

I. PRELIMINARY AND PROCEDURAL MATTERS

On November 13, 2002, Midwest Generation Energy Services, LLC (“Applicant”) filed a verified application with the Illinois Commerce Commission (“Commission”) requesting a certificate of service authority in order to become an alternative retail electric supplier (“ARES”) in the State of Illinois pursuant to Section 16-115 of the Public Utilities Act (“Act”), 220 ILCS 5/1-101 et seq., and 83 Ill. Adm. Code 451 (“Part 451”). On November 22, 2002, notice of this application was published in the official state newspaper pursuant to Section 16-115(b) of the Act and Section 451.30 of Part 451.

The Administrative Law Judge requested additional information relating to various provisions of Part 451, as well as certain clarifications of matters contained in the application. Applicant filed verified responses thereto.

Local Unions 15, 51 and 702, International Brotherhood of Electrical Workers, AFL-CIO filed a petition to intervene in this proceeding that was granted by the Administrative Law Judge.

II. AUTHORITY SOUGHT BY APPLICANT

Applicant requests authority to sell retail electricity and power to eligible nonresidential retail customers with annual electrical consumption greater than 15,000 kilowatt-hours (“kWh”), in the service areas of all Illinois electric utilities.

At this time, Applicant does not seek authority to provide single billing services to customers. Therefore, Applicant did not provide financial information pertaining to Subpart F of Part 451.

III. REQUIREMENTS FOR ALL APPLICANTS UNDER SECTION 16-115 AND SUBPART A OF PART 451

Applicant is a corporation incorporated under the laws of the State of Delaware. A Certificate of Authority to Transact Business in Illinois from the Office of the Secretary of State, State of Illinois was provided.

Applicant states that its employees will not be installing, operating, and maintaining generation, transmission, or distribution facilities within Illinois. No further demonstration of compliance with the requirements of Section 451.20(f)(2) has been made. Accordingly, Applicant's employees are not permitted to perform such functions, and other entities are not permitted to perform such functions pursuant to contractual arrangements with Applicant.

Applicant indicates that it will be engaged in the business of selling electric power and energy at wholesale and retail. Applicant states that it will be marketing power at retail in the State of Illinois that is generated at facilities located in the State of Illinois owned or leased by Midwest Generation, LLC, an affiliated company, supplemented by other resources.

Applicant has provided notice to the Illinois electric utilities of its intent to serve in the utilities' respective service areas.

Applicant has certified that it will comply with all applicable regulations; that it will provide service only to retail customers eligible to take such services; that it will comply with informational and reporting requirements established by Commission rule; that it will comply with informational and reporting requirements pursuant to Section 16-112 of the Act; and that it will comply with all other applicable laws, regulations, terms and conditions required to the extent they have application to the services being offered by Applicant as an ARES.

Applicant has agreed to submit good faith schedules of transmission and energy in accordance with applicable tariffs. Applicant has agreed to adopt and follow rules relating to customer authorizations, billing records, and retail electric services. Applicant has agreed to confidential treatment of customer data. Applicant is not currently authorized to operate as an ARES in Illinois.

As required by Section 451.50(a), Applicant provided a copy of an executed permit bond in the amount of \$150,000 in favor of the People of the State of Illinois.

Applicant states that it is a wholly-owned subsidiary of Edison Mission Marketing & Trading, Inc. ("EMMT"). Applicant indicates that it will contract with EMMT to provide technical and managerial services. Applicant states that it may also contract with EMMT for wholesale purchases of electric power, including power from the Midwest Generation Illinois plants. Applicant states that EMMT is a wholesale trader of physical and financial energy products with emphasis in the power sector, as well as in the natural gas, petroleum products, and emissions sectors. Applicant indicates that EMMT's physical trading volume in 2001 was 26.0 billion kWh of electricity.

Applicant states that both EMMT and Midwest Generation, LLC are owned by Edison Mission Energy ("EME"), a global energy company. Applicant indicates that EME has developed and acquired a portfolio of 76 generating assets, with a net generating capacity of nearly 19,000 megawatts. Applicant says that EME is wholly-owned by Edison International, which also owns Southern California Edison Company, California's second largest investor owned electric utility company.

IV. TECHNICAL, FINANCIAL, AND MANAGERIAL REQUIREMENTS OF SECTION 16-115 AND SUBPART D OF PART 451

Applicant asserts that it meets the financial qualifications set forth in Section 16-115(d)(1). For purposes of demonstrating compliance with the provisions of Section 451.220(a)(4) of Part 451, Applicant certified that it would offer to reimburse its Illinois retail customers for the additional costs those customers would incur to acquire retail energy if Applicant failed to comply with a contractual obligation to supply such energy. Applicant indicated its intent to provide a letter of credit issued by Citibank, an institution meeting the requirements of Section 451.220(a)(4)(C), in the amount of \$2,500,000 to cover this prospective obligation to reimburse its Illinois retail customers. The letter of credit is to be in favor of the Illinois electric utilities, to be drawn upon only upon issuance of an order of the Commission ordering refunds to Applicant's Illinois retail customers. Applicant has not yet provided the letter of credit and, therefore, has failed to demonstrate that it meets the financial qualifications necessary to obtain the Certificate of Service Authority it requested under Section 16-115 of the Act.

Applicant also represents that it meets the technical and managerial qualifications set forth in Section 16-115(d)(1) and Sections 451.230 and 451.240. Applicant identified the personnel who purportedly satisfy the criteria, and provided biographical information for these individuals. The Commission has reviewed the application and attachments along with the supplemental information provided by Applicant regarding the technical and managerial requirements of Section 16-115 of the Act and Part 451, and finds that Applicant has sufficiently demonstrated compliance with those requirements.

V. RECIPROCITY ISSUES UNDER 16-115(d)(5)

A. Statutory Provisions

Section 16-115 of the Act states in part:

(d) The Commission shall grant the application for a certificate of service authority if it makes the findings set forth in this subsection based on the verified application and such other information as the applicant may submit:

. . .

(5) That if the applicant, its corporate affiliates or the applicant's principal source of electricity (to the extent such source is known at the time of the application) owns or controls facilities, for public use, for the transmission or distribution of electricity to end users within a defined geographic area to which power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered, the applicant, its corporate affiliates or principal source of electricity, as the case may be, provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by the electric utility, and provided further, that the applicant agrees to certify annually to the Commission that it is continuing to provide such delivery services and that it has not knowingly assisted any person or entity to avoid the requirements of this Section. For purposes of this subparagraph, "principal source of electricity" shall mean a single source that supplies at least 65% of the applicant's electric power and energy, and the purchase of transmission and distribution services pursuant to filed tariff under the jurisdiction of the Federal Regulatory Commission or a state public utility commission shall not constitute control or access to the provider's transmission and distribution facilities;

B. The Fifth District Court Decision

Section 16-115(d)(5) of the Act was recently interpreted by the Appellate Court of Illinois, Fifth District. *Local Union Nos. 15, 51, and 702, International Bhd. of Elec. Workers v. Illinois Commerce Comm'n and WPS Energy Services, Inc., and Blackhawk Energy Services, L.L.C.*, 331 Ill. App.3d 607, 772 N.E. 2d 340, 265 Ill. Dec. 302 (2002) ("*IBEW*")

In its decision, the Appellate Court interpreted Section 16-115(d)(5) in the following manner:

"(d) The Commission shall grant the application for a certificate of service authority if it [finds] * * *:

* * *

(5) That *on condition that* (1) the applicant, its corporate affiliates[,] or the applicant's principal source of electricity (to the extent such source is known at the time of the application) owns or controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area to which electric power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered, (2) the applicant, its corporate affiliates[,] or principal source of electricity, as the case may be, provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are

reasonably comparable to those offered by the electric utility, and provided further, that (3) the applicant agrees to certify annually to the Commission that it is continuing to provide such delivery services and that it has not knowingly assisted any person or entity to avoid the requirements of this Section. * * *." (772 N.E.2d 347)

The Court further stated that, "the statute must be construed such that before the Commission grants a certificate of service authority, it must find that the applicant complies with each condition set forth in section 16-115(d)(5)." (772 N.E.2d 348)

C. Applicant's Filing, Commission Analysis and Conclusions

With regard to the first condition identified by the Court in *IBEW*, Applicant has an affiliate, Southern California Edison Company, that owns or controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area. Applicant asserts that while there are significant limitations, electric power and energy can be physically and economically delivered by the Illinois electric utilities in whose service areas Applicant proposes to offer service to the service territory of Southern California Edison Company. In Applicant's view, however, an Illinois utility choosing to engage in retail sales in California would choose to purchase power in the West as opposed to purchasing power in the Midwest. Applicant states that electricity can be economically purchased at wholesale in or near California.

According to Applicant, there are several active trading hubs in the Western Interconnect. Applicant states that two of the most liquid hubs that are directly connected to California are the California/Oregon Border ("COB") and Palo Verde hubs. Applicant indicates that two other significant trading hubs, known as NP 15 and SP 15, are within California at the points connecting northern and southern California. Applicant presented information, including daily index prices and reported volumes, in support of its position that there is an active wholesale market in the Western Interconnect. The Commission finds that Applicant has demonstrated that its affiliate, Southern California Edison Company, owns and controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area to which electric power and energy can be physically and economically delivered by Illinois electric utilities.

Regarding the second condition identified by the Court in *IBEW*, Applicant's affiliate, Southern California Edison Company, own transmission facilities within its service territory in California. Applicant asserts that this affiliate provides delivery services that in all operational aspects, are reasonably comparable to those offered by the Illinois electric utilities. Applicant indicates that retail customer choice was suspended in California effective September 21, 2001, and that no date for reinstatement has been established. According to Applicant, those retail customers that were taking direct access on September 21, 2001 can continue to do so and can switch to another electric service provider; however, any customer that was not taking direct access at the time of suspension is not currently entitled to take direct access.

Applicant indicates that 43,023 customers in the Southern California Edison Company service area and 75,295 customers in the State of California are eligible for direct access. Applicant contends that neither the statute nor the Court in *IBEW* focused on the size of the direct access market in the other state. Applicant concludes that it meets the second condition identified by the Court in *IBEW* because the nature of direct access in California is reasonably comparable to the delivery services offered by Illinois electric utilities.

The Commission finds that while Applicant's affiliate provides delivery services that are comparable in nature to those offered by electric utilities in Illinois, it does not provide delivery services that are comparable in scale to those offered by electric utilities in Illinois. In *IBEW*, the Court emphasized that the Commission could not issue a certificate if doing so "...would allow a new entrant into the Illinois utility market without providing the Illinois utilities affected by the new entrant an opportunity to also compete in the market of the new entrant..." and if doing so would allow, "...the new entrant to take an unreasonable advantage of the investments made by the formerly regulated industry." (772 N.E.2d 348)

The information provided by Applicant demonstrates that it is possible for Illinois electric utilities to enter the market of its affiliate, Southern California Edison Company. Unfortunately, the information also indicates that the number of customers eligible for delivery services in Southern California Edison Company's service territory, and the State of California in its entirety, is so small that if the Commission granted Applicant's request in this proceeding, there is a possibility that Applicant could take unreasonable advantage of the investments made by Illinois electric utilities. Taking Applicant's argument to its extreme, if a single customer in the service territory of Southern California Edison Company were eligible for delivery services, Applicant's affiliate would be offering delivery services that are comparable to those offered by Illinois electric utilities. To properly implement the Court's decision in *IBEW*, the Commission must consider the scale of delivery services provided. The number of customers eligible for direct access in the service territory of Southern California Edison Company is so small that the Commission cannot find that Southern California Edison Company provides delivery services that are reasonably comparable to that offered by Illinois electric utilities. All customers of Illinois electric utilities are eligible for delivery services.

Finally, with respect to the third criterion identified by the Court in *IBEW*, Applicant represented that it is in compliance with the reciprocity-related requirements of Section 16-115 (d)(5) of the Act; will remain in compliance with such requirements; and will annually certify such compliance to the Commission.

Since, as discussed above, Applicant has not met the reciprocity standard in Section 16-115(d) of the Act as articulated by the Appellate Court of Illinois, Fifth District in *IBEW*, and has not yet met the financial requirements of Section 16-115 of the Act and Subpart C of Part 451, the Commission concludes that Applicant's application for a certificate of service authority under Section 16-115 of the Act should be denied.

VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the entire record, is of the opinion and finds that:

- (1) Applicant, which is organized under the laws of Delaware and is authorized to do business in Illinois, seeks authority to become an ARES under Section 16-115 of the Act;
- (2) the Commission has jurisdiction of the parties hereto and the subject matter hereof;
- (3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (4) as required by Section 16-115(d)(1) of the Act, Applicant possesses sufficient technical, and managerial resources and abilities to provide power and energy to eligible nonresidential retail customers with annual electrical consumption greater than 15,000 kWh throughout the areas of Illinois electric utilities; Applicant, however, has failed to demonstrate that it possesses sufficient financial resources to be issued a certificate of service authority pursuant to Section 16-115(d)(1) of the Act;
- (5) Applicant has failed to meet the reciprocity standard in Section 16-115(d) of the Act as articulated by the Appellate Court of Illinois, Fifth District in *IBEW*; and
- (6) Applicant's request for a Certificate of Service Authority pursuant to Section 16-115 of the Act should be denied.

IT IS THEREFORE ORDERED by the Commission that the request of Midwest Generation Energy Services, LLC for a Certificate of Service Authority to operate as an alternative retail electric supplier under Section 16-115 of the Act is denied.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

Administrative Law Judge

DATED: December 13, 2002

Receipt deadlines:

Briefs on Exceptions: 12-17-02

Replies to Briefs on Exceptions: 12-19-02